No. 10,728

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM H. BARR, a minor, and AGNES D. BARR, a minor, by Zelia H. Barr, their guardian,

Appellants,

vs.

THE TRAVELERS INSURANCE COMPANY,

Appellee.

BRIEF FOR APPELLEE, THE TRAVELERS INSURANCE COMPANY.

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STATEMENT OF THE CASE.

Appellants instituted this action (together with consolidated action of Barr v. The Equitable Life Assurance Society, No. 10,729) in the Superior Court of the State of California for the purpose of recovering the double indemnity provision of $10,000 under a policy providing for the payment thereof in the event that (Dr.) Arthur Barr, the insured, died and such death "resulted from bodily injuries effected directly and independently of all other causes through external, violent and accidental means". (R. 10.)

Dr. Barr died on June 6, 1942. Appellants contended that such death was caused by "external, violent and accidental means". Appellee denied that such was the fact (R. 30), and this was the sole issue presented at the trial. (R. 46.)

The ordinary insurance of $10,000 had been paid prior to the institution of the action. (R. 47.)

The action was removed from the state Court to the federal District Court for trial on petition of appellee. (R. 19-28.)

At the conclusion of appellants' case, appellee made a motion for an order dismissing the action under Rule 41(b) of the Rules of Civil Procedure for the District Courts of the United States. (R. 272.) The motion was granted (R. 275) and a judgment and order of dismissal was accordingly made and entered. (R. 34.) The appeal is taken from such judgment and order. (R. 276.)

APPELLANTS' THEORY OF THE CASE AND CONTENTIONS ON APPEAL.

It was the theory of appellants, in the trial Court, that Dr. Barr while on a hunting trip was bitten by a tick in either Lassen County, California, or in Reno, Nevada; that such tick was of the species known as *Dermacentor andersoni;* that such species of tick is the vector or transmitting agent of Rocky Mountain spotted fever; that the tick bite infected Dr. Barr with the disease which, in turn, produced a pneumonia from which the assured died. Such is also appel-

lants' contention on this appeal. (Appellants' Opening Brief, pp. 20-21.)

Appellants contend, on this appeal, that the judgment of dismissal was erroneous and should be reversed for the following reasons:

1. That a proceeding under Rule 41(b) is analogous to a motion for a nonsuit and, under the doctrine announced in *Erie R. R. Co. v. Tompkins,* 304 U. S. 64, 82 L. ed. 1188, the law of California must be followed in determining such motion.

2. That in California a motion for nonsuit must be denied if there is any evidence making out a *prima facie* case for plaintiff.

3. That the evidence introduced at the trial made out a *prima facie* case of death by accidental means, *ergo,* the Court erred in ordering and making a judgment of dismissal.

APPELLEE'S CONTENTIONS.

Appellee contends that the judgment and order of dismissal should be affirmed for the following reasons:

1. A proceeding under said Rule 41(b) is not analogous to a motion for a nonsuit in the California Courts.

2. The doctrine announced in *Erie R. R. Co. v. Tompkins, supra,* applies only to matters of substantive law and has no application to mere matters of procedure.

3. A judgment of dismissal under Rule 41(b) must be affirmed if there is substantial evidence for its support.

4. Even if the California rule as to nonsuits be applicable there was no evidence making out a *prima facie* case of death resulting from the bite of an infected tick.

5. The appellants failed to sustain the burden of proving a death by accidental means as claimed, in the following particulars:

(a) There was no proof that the tick which bit Dr. Barr was of the species *Dermacentor andersoni;*

(b) There was no proof that the tick which bit Dr. Barr was an infected tick, even if it be assumed it was of the species *Dermacentor andersoni;*

(c) There was no proof that the assured had the pathology of Rocky Mountain spotted fever;

(d) The clinical findings, as proved by appellants, do not establish Rocky Mountain spotted fever.

6. The evidence established that Dr. Barr died of an atypical pneumonia of the virus or influenzal type, produced by causes other than Rocky Mountain spotted fever.

ARGUMENT.

1. THE DOCTRINE ANNOUNCED IN ERIE R. R. CO. v. TOMPKINS APPLIES ONLY TO MATTERS OF SUBSTANTIVE LAW AND DOES NOT APPLY TO MATTERS OF PROCEDURE.

Appellants contend that as the case was removed from a state Court to the Federal Court the law of the state must be applied and, it being contended that a motion for dismissal in the federal Court under the rule being analogous to a motion for nonsuit in the state Court, the motion must be denied if the evidence, being construed most strongly in favor of appellants, makes out a *prima facie* case in their behalf, such being the law of California relative to nonsuits.

It has definitely been decided that the rule in the case of *Erie R. R. Co. v. Tompkins* applies only to matters of substantive law and has no application to matters of procedure, such latter matters being within the control of the federal Courts.

Our Supreme Court in *Sibbach v. Wilson,* 312 U. S. 1, 85 L. ed. 479, has decided this matter as follows:

> "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States; but it has never been essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose * * *"
> (312 U. S. at 9, 85 L. ed. at 483.)

The Supreme Court then announces the test to be applied as follows:

> "The test must be whether a rule regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." (312 U. S. at 14, 85 L. ed. at 485.)

In closing the Supreme Court stated:

> "* * * it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy fair and exact determination of the truth. The challenged rules comport with this policy." (312 U. S. at 14, 85 L. ed. 485.)

Rule 41(b) of Civil Procedure for the District Courts reads:

> "After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

Clearly the foregoing rule relates to a mere matter of procedure under the test announced in the fore-

going case. The rule relates to "the judicial process for enforcing rights and duties recognized by substantive law".

If the Court procedure—the judicial process—for enforcing a right conferred by substantive law of a state does not include the manner and method by which the existence of the right is to be determined, then every case removed from a state to a federal Court for trial must adopt the state procedure in those instances where the litigant would be entitled to insist that such procedure be followed if the case had not been removed. In California a litigant is entitled to a verdict if three-fourths of the jury concur in his favor; a litigant is entitled to a jury selected from the county; he is entitled to a definite number of peremptory challenges; a judgment of nonsuit is not an adjudication on the merits, etc. In the federal Courts a jury verdict must be unanimous; a jury panel may be selected from several counties; the number of peremptory challenges differ; a dismissal under the rule is an adjudication on the merits. If appellants' contention be sound then every case transferred to a federal from a state Court must be tried according to such rules of procedure as prevail in the state. Such is not the law.

2. A JUDGMENT OF DISMISSAL MUST BE AFFIRMED IF THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT IT.

It is settled that a judgment of dismissal under Rule 41(b) is to be affirmed on conflicting evidence when there is any substantial evidence to support findings in favor of defendants.

Young v. United States (CCA-9), 111 F. (2d) 823, 825;

Gary Theatre Co. v. Columbia Pictures Corp. (CCA-7), 120 F. (2d) 891, 892.

In the instant case there is no conflict in the evidence. There is no competent evidence in favor of appellants.

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3. THE ASSURED HAD NONE OF THE CHARACTERISTIC PATHOLOGY OF SPOTTED FEVER.

Appellants do not contend that tick bite directly induced the pneumonia. At pages 20-21 of their brief they declare the assured "was suffering from Rocky Mountain spotted fever, which developed into pneumonia, which latter disease was the terminal cause of death".

In his opening statement to the trial Court, appellants' counsel announced that he would prove that pathologists demonstrated rickettsiae in tissues taken from the assured at the autopsy. (R. 41.) The appellants not only failed to make any such proof, but by their own witnesses affirmatively showed that there were no lesions of rickettsiae in the assured's body.

Rickettsiae are minute bacterium-like organisms which live and multiply only in living cells. (Tr. 185.) Infection results from transmission by bite into the human blood stream. (Tr. 140.) During the first week from onset some rickettsiae should still be found in the blood stream. (Tr. 115, 125.) Samples of the assured's whole blood, taken midway between onset and death and kept in a refrigerator until delivery to the laboratory (R. 101-2), were subjected by the State Health Department to standard laboratory tests for the purpose of detecting rickettsiae. Each of these tests failed to demonstrate any trace of rickettsiae in assured's blood stream. (R. 110, 126.)

Dr. Merrill, chief of the Division of Laboratories, State Health Department, testified:

> "A. Three lines of investigation were followed: The blood was cultured into culture media in an attempt to demonstrate any pathogenic bacteria that might be present. The blood stream was tested for its agglutinant activity against known cultures or known organisms, and laboratory animals, guinea pigs, were inoculated with the whole.
>
> Q. The result of all those tests was what?
>
> A. Our cultures were negative; our agglutination tests were negative; and our animal inoculations were negative." (R. 110.)

> "A. Well, there are two standard tests that are used actually to detect the presence of rickettsial bodies.
>
> Q. You used both of those, did you not?
>
> A. That is right.

Q. And so far as your results of your experiments were concerned, there was no showing that rickettsial bodies, pathogenic and guinea pig, were present in the Dr. Barr's blood?

A. That is right." (R. 125-6.)

The foregoing tests being negative, appellant's counsel then announced he would produce other evidence of the presence of rickettsiae. (R. 119.)

Dr. Moody was then called by appellants as a pathologist. He testified that he attended the autopsy on assured's body and took away certain portions of the body (a portion of the brain, a piece of skin, sections of the heart, liver, lungs, blood vessels, etc.) and later examined and tested them for the presence of rickettsiae. (R. 165.) Dr. Moody then testified on direct examination:

"Q. Did you find certain bodies, Doctor, of significance?

A. Well, I do not know whether they are of any significance or not. I found what I thought was one mass of annucleation bodies in the section of the lungs, but that is the only place.

Q. In the section of lungs?

A. Yes.

Q. What was the appearance of those bodies? Were they in clusters or aggregates?

A. Yes, they were included in a fairly large cell with Gisma strain. They stained green. **There was a whole group of very fine bodies that I was unable to identify.** I made a search to see if I could find any others resembling them, but I could not." (R. 167.)

"Q. Could those bodies which you have described—and it is my recollection that those were the bodies in clusters that strained green under the Gisma stain—have been rickettsial bodies?

A. I really do not know whether they could or could not, but **it is my impression that what rickettsial bodies should look like were not like the bodies I saw.**" (R. 169.)

On cross-examination Dr. Moody testified:

"Q. In other words, your finding was in effect, Doctor, that this man did not have the blood vessel condition that is common to Rocky Mountain spotted fever?

A. That is right.

Q. Now, you have already testified, I believe, on direct examination that you also found—that you did not find or recognize any rickettsial bodies in Dr. Barr's——

A. **I saw nothing that looked to me like rickettsial bodies.**" (R. 188-9.)

Dr. Eaton, director of laboratory research, State Department of Health, had a specimen of assured's blood and tissue from his body, with which he made certain tests. He testified that he did not see any rickettsia-like bodies (R. 135) and was unable to demonstrate any rickettsial bodies in his examination of the tissues. (R. 138.)

Dr. Eaton then distinguished between rickettsiae and a virus such as produces virus pneumonia from which assured died:

"Q. Now, I understood you to say that a virus is an organism which is not visible under the microscope, is that correct?

A. That is the definition that is generally used.

Q. A rickettsial body, on the other hand, is a bacterium-like body which may be seen microscopically, is it not?

A. Yes." (R. 138.)

Then Doctor Eaton asserted:

"Q. Did you find the pathology and the specimens from Dr. Barr to differ from those specimens which you examine in the ordinary virus pneumonia fatal case?

A. Not essentially, no, in this type of rapidly fatal case.

Q. **In other words, from your observation and experiments there was nothing which prompted you to believe that the cause of the pneumonia was rickettsial in nature?**

A. **No.**" (R. 138-9.)

Dr. Karl F. Meyer, also called by appellants, testified that he saw certain elementary bodies in the lung cells which could be said to be rickettsiae-like as distinguished from rickettsia (R. 152-154) and when asked if in his opinion these elemental bodies "could have been rickettsiae stated:

"I wouldn't commit myself on that, whether they are rickettsia or elementary bodies. You could not commit yourself on a miscroscopic examination of sections on embalmed material." (R. 156.)

Dr. Meyer then testified that such elemental bodies could have been those bodies frequently seen in ordi-

nary virus pneumonia cases where there was no suspicion of tick-bite.

"Q. As I understand your conclusion, Doctor, it is that you cannot say that the elementary bodies which you saw were rickettsiae?

A. That is correct.

Q. And you cannot say what else they might have been?

A. That is correct.

Q. It is a fact that they might have been any one of numerous or perhaps we might say innumerable other things?

A. That is correct.

Q. **And they might have been any of a number of things which we see in the usual case of virus pneumonia where there is no suspicion or where there is no history of a tick bite?**

A. **That is correct.**" (R. 158.)

Every pathological, serological and laboratory test and study employed by appellants' experts failed to show any trace of rickettsiae or their lesions; the microscopic examination positively established that the pathology was not that of tick fever but that of virus pneumonia.

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4. THE CLINICAL FINDINGS DID NOT INDICATE SPOTTED FEVER.

At page 20 of appellants' brief it is said that "The clinical history of the case and the symptoms, such as the rash, the high fever and the cyanosis" show that "the assured was suffering from Rocky Mountain

spotted fever". This is incorrect, the clinical findings are consistent with a virus pneumonia.

Drs. Moody and Marston were the only witnesses who testified as to the clinical manifestations of spotted fever.

Dr. Moody testified that in spotted fever fatal cases the disease is accompanied by a very pronounced enlargement of the spleen so that it would be easily palpable by the common method. (R. 179.) Dr. Moody was present at the autopsy and testified: "I do not believe this spleen was large enough to be felt". (R. 179.)

Dr. Marston testified that in spotted fever cases the spleen is enlarged, tender and palpable and that even clinically you can feel it bulging out; that such condition is almost invariable. (R. 236.) He then stated that when the insured was in the hospital he was unable to palpate the spleen and that at the autopsy he noted that the spleen was not enlarged.

Dr. Marston further testified that in spotted fever cases the white blood count runs between 8,000 and 12,000 and higher; that the average is between 8,000 and 12,000. (R. 236.) He then testified that Dr. Barr had a very definite leucopenia, and that his white blood count was only 2,800. (R. 236.) Dr. Marston further testified that the uncontradicted authority is to the effect that the only helpful clinical manifestation of spotted fever is a characteristic rash (R. 235); that death without such rash is a rare and unusual occurrence (R. 236); that before Dr. Barr died he

had looked for a rash or petechial spots and did not find any. (R. 220.) When Dr. Barr was examined by Dr. Briggs just prior to his fatal onset his entire body was carefully examined and Dr. Briggs found that his skin was normal with no evidence of any rash of any kind. (R. 74.)

Thus, the three important clinical manifestations of spotted fever—enlarged and palpable spleen, high white blood count and characteristic rash, were all absent in the case of assured. The clinical manifestations presented were entirely consistent with that of a fatal virus pneumonia.

Dr. Marston testified that the clinical course could be entirely compatible with an influenzal pneumonia. (R. 223.)

He further testified that pains, chills and fever are the usual characteristics of any serious febrile disease (R. 223); serious pains may occur in fatal pneumonia cases (R. 227); that cyanosis is usually encountered in a pneumonia case shortly prior to death (R. 223); and that delirium is generally associated with high fever. (R. 237.)

Dr. Marston's testimony will be discussed at greater length hereafter.

The evidence established that the clinical manifestations during assured's last illness were entirely consistent with a fatal virus pneumonia and inconsistent with spotted fever.

In addition to the foregoing it must be borne in mind that Dr. Marston was the attending physician

who signed the death certificate in which he stated that the cause of death was bronchial pneumonia and did not set forth that Rocky Mountain spotted fever or anything else was a predisposing cause.

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5. DR. MARSTON'S OPINION DOES NOT CONSTITUTE EVIDENCE.

Dr. Marston, on direct examination, was asked whether he had any opinion as to what relationship the tick bite bore to the case. His reply, on page 216 of the record, is as follows:

> "A. I have felt that due to the history of the tick bite in an area where there have been cases reported of tick bite fever, and due to the abruptness of the onset, the mental confusion, nervousness, extreme pains, incubation period of approximately three or four days—I felt that it was most likely due to tick bite."

On cross-examination the doctor explained the foregoing answer in the following manner:

> "Mr. Friedman. Q. Doctor, when did you form the opinion that the tick bite might have caused this death?
>
> A. Well, I suspected it when the history was first given to me, that he had been bitten by a tick; that is one reason why I had called in Doctor Reed. I had never seen a case, and I believe he had seen some, that he knew more about it than I did, so that is why I felt I needed consultation.
>
> Q. I see; so that you had a suspicion of that?
>
> A. Yes, I did.

Q. And that suspicion matured into a definite opinion at the time the man died, or subsequently?

A. Yes, I had had that suspicion right along. **My opinion has never been real definite. I felt it was most likely that he died of that. It is possible that he did not.** One of the workers over at Berkeley at the Department of Laboratories told me in that neighborhood where he had been hunting there had been cases of Rocky Mountain spotted fever. There also had been cases of plague, and that sort of thing.

Mr. Mackey. If the Court pleace, I think that should go out as hearsay.

The Witness. I am just telling you why I was suspicious.

Mr. Friedman. Q. I am asking you——

A. And why I felt that that was most likely the cause of his bronchial pneumonia.

Q. **But you are not at all certain at this time?**

A. **No, I am not.**

Q. **You simply feel that it was more likely to be that than something else?**

A. **That is right.**

Q. **That is the sum and substance of your present state of mind, isn't it?**

A. **Yes.**'' (R. 239-240.)

From the foregoing it will be seen that Mr. Marston had no definite opinion on the ultimate question involved. He did not know what induced the pneumonia causing Dr. Barr's death.

Dr. Marston formed his opinion without knowing anything concerning the assured's pathology. He conceded that a clinical diagnosis of spotted fever must

be abandoned if the pathology of spotted fever was absent. He testified that if there was always proliferation in the terminal vessels in cases of tick bite fever and if there were none found in the examinations and tests made in the instant case that such fact would alter his opinion. (R. 232-3.)

The foregoing opinion of Dr. Marston did not constitute competent evidence. His testimony amounted to no more than a mere speculation as to the possibilities involved in the case. The doctor frankly stated that his opinion was not real definite and that there was a possibility that the assured had died of something other than Rocky Mountain spotted fever. We believe the law relating to a situation of this kind is correctly stated in two California cases as follows:

> "When a witness states that he does not know which of two inconsistent things is true it cannot be inferred therefrom that either the one or the other is the fact."
>
> *Leach v. Board of Dental Examiners,* 87 Cal. App. 207.

> "In that connection it should be noted that upon the issues raised by the pleadings, the plaintiff was bound to assume the burden of proof and in the end prevail by a preponderance of the evidence. If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary. (*Patterson v. San Francisco etc. Ry. Co.,* 147 Cal. 178 (81 Pac. 531).) A judgment cannot be based on guesses or conjectures. (*Puckhaber*

v. Southern Pac. Co., 132 Cal. 363 (64 Pac. 480).) And, also, 'A finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence. A majority of chances never can suffice alone to establish a proposition of fact, since the slightest real evidence would outweigh all contrary probabilities. (23 Cor. Jur., sec. 1750, p. 18.)"

Reese v. Smith, 9 Cal. (2d) 324, 328.

Dr. Marston's entire opinion was based on the assumption, unsupported by any evidence, that the assured had been bitten by an infected tick. **He frankly states that if the history of the tick bite were removed from the history of the case it would be his opinion that Dr. Carr died from some influenzal type of infection.** (R. 223.)

Dr. Marston's opinion rests upon two unwarranted and non-permissible assumptions. He assumes that assured had spotted fever and from this concludes that the assured was bitten by an infected tick or, stated conversely, he assumes that insured was bitten by an infected tick and therefore concludes that he had spotted fever. Neither of these assumptions constitutes competent evidence and the opinion so given is not sufficient to sustain the burden of proof appellants had to carry.

In *National Association of Postal Clerks v. Scott* (CCA-2), 155 Fed. 92, the claim was that Scott had received accidental injuries in 1902 which ultimately resulted in his death. The evidence showed that he

had various internal disorders and diseases. Various hypothetical questions were put to the medical experts whose replies were to the effect that injury may have produced the ensuing chain of circumstances leading to death. In holding this evidence insufficient the Court at page 95 said:

> "In the hypothetical questions addressed to the medical experts the plaintiff's counsel assumes that Scott received an external injury on November 1st severe enough to produce shock which caused all the other ailments which resulted in his death. Indeed, the trial proceeded from beginning to end upon this theory, which would be plausible enough were not the major premises—injury through external, violent and accidental means—wholly lacking.
>
> It is true that he had a bruise on his left shin, but everything else regarding it is left to conjecture. Instead of proving an injury received at Cuba on November 1st severe enough to produce shock, the presence of shock caused by the injury and nephritis and heart disease resulting from shock, the plaintiff's logic is in the inverse order. The argument proceeds on the following hypotheses—that death on January 25, 1903, was caused by diseases which may have been produced by shock, that shock may be caused by a severe external injury, that a bruise on the skin indicates an external injury, therefore Scott must have received such an injury on November 1st at Cuba. It will be observed that there is a fatal hiatus between the fact that death occurred and the conclusion that it was caused alone by an external injury.

> We are of the opinion, therefore, that the court should have directed a verdict for the defendant on the ground that the plaintiff had not sustained the onus of proving that Scott's death was caused alone by external violent and accidental means.
>
> As there was no direct proof of this fundamental fact and as plaintiff's contention regarding it rested only upon presumption and guesswork, it was the duty of the court to direct a verdict for the defendant."

If we may substitute the facts in the instant case for those set forth in the foregoing case, the decision would read something as follows:

It is true that assured was bitten by a tick but everything else regarding it is left to conjecture. There is no evidence that the tick was of the vector species, or, if so, that it was infected. Instead of proving a bite by an infected tick which produced spotted fever which in turned caused a virus pneumonia and then death, appellants' logic is in the reverse order. The argument proceeded on the following hypothesis: that death was caused by a pneumonia which may have been produced by spotted fever; that spotted fever can be caused by a bite of an infected tick; that assured was bitten by a tick, therefore insured must have been bitten by an infected tick. It will be observed that there is a fatal hiatus between the fact that death occurred and the conclusion that it was caused by the bite of an infected tick.

An inference will not establish a fact necessary to a recovery by a plaintiff where the same evidence gives

rise to inferences directly contrary thereto. (*Penn. R. Co. v. Chamberlain,* 288 U. S. 333, 339, 77 L. ed. 819.) The testimony of Dr. Marston falls within this rule. Even though it could be inferred from his testimony that Dr. Barr had spotted fever, which inference his testimony does not warrant, nevertheless his testimony is equally susceptible of the inference that Dr. Barr did not have spotted fever. The record being in this state, plaintiff has failed to carry the burden of proof.

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6. THERE WAS NO EVIDENCE ESTABLISHING THAT THE ASSURED WAS BITTEN BY A TICK OF THE SPECIES DERMACENTOR ANDERSONI, OR THAT SUCH TICK WAS INFECTED.

The Court will notice that there are many species of ticks; that only certain species are infected and capable of transmitting disease to humans, and of such species all such ticks are not infected or vectors.

Dr. Eaton, medical bacteriologist and a director of the Research Laboratory of the State Department of Public Health, testified that all ticks of the denounced species do not carry rickettsia; that only "a very small percentage of them carry it" (R. 147); that in Lassen County only ten per cent of the denounced species of ticks are vectors. (R. 149.)

Thus, the bite of a tick of the species *Dermacentor andersoni* may be entirely harmless, only about ten per cent of such species being infected. Even if the evidence established that Dr. Barr was bitten by a

tick of this species, this would not establish that such tick was infected.

However, there is no proof that the tick which bit Dr. Barr was of the denounced species.

Louis Nave testified that deer and antelope in Lassen County carry ticks and that the assured killed and dressed an antelope (R. 50-60); that he and Dr. Barr had hunted together in Lassen County for a period of ten years and both he and Dr. Barr had been bitten many times by ticks and, with the exception of the sore produced by the bite, they had suffered no other effects. (R. 91-92.) Nave further testified that two ticks, bearing white spots and resembling ladybugs, fell from his own clothes on the day following the hunt. (R. 79-80.) At the same time Nave saw part of a tick whose head was embedded in the assured's abdomen. This tick was removed by the assured while alone and no one saw it thereafter. (R. 81-84.) Nave gave no description of the tick he saw embedded in the doctor's abdomen.

After the assured died a tick was found in his clothing and passed through the hands of the following named persons: Mr. Ferguson (R. 270), Dr. Moody (R. 160) and Dr. Meyer. The latter testified that he sent this tick to the Department of Entomology of the University of California for identification. (R. 156-158.) Dr. Herms, head of that department, had no recollection of having received the tick. (R. 202-206.) None of these persons described or identified the tick as one of the vector species. There was

no evidence that the tick found in the assured's clothes was the same as the tick Nave saw embedded in the assured's abdomen.

There was no proof establishing that the tick which bit Dr. Barr was one of the denounced species or, if of such species, that it was infected. Appellants' entire case depended upon the proof establishing that Dr. Barr was bitten by an infected tick of the denounced species, that such bite transmitted spotted fever to the assured, which in turn caused a pneumonia from which he died. The major and essential fact which appellants had to establish was that the tick was infected. This basic fact cannot be inferred because the medical facts, if not, as we contend, completely foreclosing such an inference, at least warrant an inference directly to the contrary, viz.: that assured was not bitten by an infected tick.

An inference will not establish a fact necessary to a recovery by plaintiff where the same evidence gives rise to inferences directly contrary thereto.

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. (Citing cases.)
>
> The rule is succinctly stated in Smith v. First Nat. Bank, 99 Mass. 605, 611, 612, 97 Am. Dec. 59, quoted in the Des Moines Nat. Bank Case (C.C.A. 8th) 145 Fed. 273, supra:

'There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.' "

Penn. R. Co. v. Chamberlain, 288 U. S. 333, 339-340, 77 L. ed. 819, 823.

Following the foregoing language the Supreme Court announces another rule fatal to appellants' case, as follows:

"And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

7. SUMMARY AND CONCLUSION.

The burden of proof was at all times on the appellants to establish by a preponderance of competent evidence that the insured came to his death through accidental means:

Metropolitan Life v. Broyer (CCA-9), 12 Fed. (2d) 818;

U. S. Fidelity Co. v. Blum (CCA-9), 270 Fed. 946, 952.

Under the facts in the instant case, appellants in order to establish such accidental means had to prove that insured was bitten by an infected tick, that such bite infected insured with spotted fever which in turn was the predisposing cause of the pneumonia from which insured died.

Nowhere in the record is there any evidence establishing the foregoing facts. Whether the tick by which Dr. Barr was bitten was infected is a matter remaining in the realm of conjecture and surmise. The facts are insufficient to give rise to any inference or presumption that such tick was in fact infected. Every expert called by appellants gave evidence which in no manner could be construed as justifying the conclusion that insured had spotted fever. Every test made failed to disclose either the presence of rickettsiae or the effects of rickettsiae. The pathology was not indicative of spotted fever and the clinical manifestations were consistent with a virus pneumonia and inconsistent with spotted fever.

Every premise in the case of appellants is unreliable and uncertain. The circumstances relied on by appellants as making out a *prima facie* case are mere presumptions and assumptions. These circumstances had to be proved and not presumed. The law in this regard has been stated by the Supreme Court as follows:

> "These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev., p. 80, lays down this rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. A presumption which the jury is to make is

not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption."

United States v. Ross, 2 Otto 281, 23 L. ed. 707, 708.

The order and judgment of dismissal should be affirmed.

Dated, San Francisco,
February 19, 1945.

Respectfully submitted,
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